



22 CFR Part 120

[Public Notice: 11801]

RIN 1400-AF26

International Traffic in Arms Regulations: Amendment to the Definition of Activities that Are Not Exports, Reexports, Retransfers, or Temporary Imports

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: The Department of State proposes to add two new entries to the International Traffic in Arms Regulations (ITAR) to expand the definition of “activities that are not exports, reexports, retransfers, or temporary imports.” First, subject to certain conditions, the taking of defense articles outside a previously approved country by the armed forces of a foreign government or United Nations personnel on a deployment or training exercise is not an export, reexport, retransfer, or temporary import. Second, a foreign defense article that enters the United States, either permanently or temporarily, and that is subsequently exported from the United States pursuant to a license or other approval under this subchapter, is not subject to the reexport and retransfer requirements of this subchapter, provided it has not been modified, enhanced, upgraded, or otherwise altered or improved or had a U.S.-origin defense article integrated into it.

DATES: Send comments on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: Interested parties may submit comments by one of the following methods:

- *Email:* DDTCPublicComments@state.gov with the subject line, “ITAR Amendment – 120.54 Additions.”
- *Internet:* at *www.regulations.gov*, search for this notice, Docket DOS-2022-0031.

Comments received after that date may be considered if feasible, but consideration cannot be assured. Those submitting comments should not include any personally identifying information they do not desire to be made public or any information for which a claim of confidentiality is asserted, because comments and/or transmittal emails will be made available for public inspection and copying after the close of the comment period via the Directorate of Defense Trade Control website at *www.pmdtcc.state.gov*. Parties who wish to comment anonymously may submit comments via *www.regulations.gov*, leaving the fields that would identify the commenter blank and including no identifying information in the comment itself.

FOR FURTHER INFORMATION CONTACT: Dilan Wickrema, Office of Defense Trade Controls Policy, U.S. Department of State, telephone (202) 634-4981, or e-mail DDTCCustomerService@state.gov. ATTN: Regulatory Change, ITAR 120.54 additions.

SUPPLEMENTARY INFORMATION: The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120 through 130). The items subject to the jurisdiction of the ITAR, *i.e.*, defense articles and defense services, are identified on the ITAR's U.S. Munitions List (USML) (22 CFR 121.1). The ITAR imposes license requirements for exports and reexports of controlled items.

On March 25, 2020, the Department added a new ITAR section (§ 120.54) to clarify and consolidate activities that do not require authorization from the Department (84 FR 70887). This proposed rule would add to ITAR § 120.54 two activities that are not controlled events (defined herein, and in the previous rule, to mean “an export, reexport, retransfer, or temporary import”) and therefore do not require authorization from the Department. While previously not specified in the ITAR, the Department's long-standing policy is that these two proposed activities are not controlled events.

The first of the two new proposed additions to ITAR § 120.54 is a new paragraph (a)(6) making explicit that the taking of defense articles outside a previously approved country by the armed forces of a foreign government or United Nations personnel on a deployment or training exercise is not a controlled event, provided there is no change in end-use or end-user. The Department proposes this new provision to ensure interoperability between and among the United States and partner countries' armed forces when deployed and to provide assurances to partner countries that have requested a clearer statement of the long-

standing Department policy articulated in this proposed rule. This policy is noted in DDTC's "Guidelines for Preparing Agreements" and this proposed provision would codify this long-standing understanding in the ITAR.

The second addition to ITAR § 120.54 would state in a new paragraph (a)(7) that the transfer of a foreign defense article originally imported into the United States that has since been exported out of the United States, is not a controlled event, unless certain enumerated circumstances have occurred.

The Department proposes this new provision to eliminate any misperception that foreign defense articles which originally entered the United States and have since been exported out of the United States always will require Department authorization for subsequent transfers. The Department assesses this proposed provision will address concerns raised by partners and allies and avoid the need for unnecessary requests for authorization on the part of domestic and foreign defense companies.

REQUEST FOR COMMENTS: The Department welcomes public comment on any of the proposed changes set forth in this rule. In particular, we invite comments from foreign government end-users on the application of these provisions.

REGULATORY ANALYSIS AND NOTICES

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United

States government and rules implementing this function are exempt from sections 553 (rulemaking) and 554 (adjudications) of the Administrative Procedure Act (APA), pursuant to 5 U.S.C. 553(a)(1). Notwithstanding the assertion of the foreign affairs exemption, the Department is soliciting comment on this proposed rule.

Regulatory Flexibility Act

Notwithstanding the Department's publication of this rulemaking as a proposed rule, this rule is exempt from the notice-and-comment rulemaking provisions of 5 U.S.C. 553 as a foreign affairs function. Therefore, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This rulemaking does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Executive Orders 12372 and 13132

This rulemaking will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed amendment does not have sufficient federalism implications to require

consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this rulemaking.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). This rule's scope does not impose additional regulatory requirements or obligations; therefore, the Department believes costs associated with this rule will be minimal. Although the Department cannot determine based on available data how many fewer licenses will be submitted as a result of this rule, the amendments to the definition of activities that are not exports, reexports, retransfers, or temporary imports will relieve licensing burdens for some exporters. This rule is consistent with Executive Order 13563, which emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a "significant regulatory action," although not economically significant, by the Office of Information and Regulatory Affairs under Executive Order 12866.

Executive Order 12988

The Department of State has reviewed the proposed rulemaking in light of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State determined that this proposed rule will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

Paperwork Reduction Act

This proposed rule does not impose or revise any information collections subject to 44 U.S.C. chapter 35.

List of Subjects

22 CFR Part 120

Arms and munitions, Classified information, Exports.

For the reasons set forth above, the Department of State proposes to amend title 22, chapter I, subchapter M, part 120 as follows:

PART 120 – PURPOSE AND DEFINITIONS

1. The authority citation for part 120 continues to read as follows:

Authority: 22 U.S.C. 2651a, 2752, 2753, 2776, 2778, 2779, 2779a, 2785, 2794, 2797; E.O. 13637, 78 FR 16129, 3 CFR, 2013 Comp., p. 223.

2. Amend § 120.54 by adding paragraphs (a)(6) and (7) to read as follows:

§120.54 Activities that are not exports, reexports, retransfers, or temporary imports.

(a)* * *

(6) The taking of a defense article subject to the reexport or retransfer requirements of this subchapter on a deployment or training exercise outside a previously approved country, provided:

(i) the defense article is transported by and remains in the possession of the armed forces of a foreign government or United Nations personnel; and

(ii) there is no change in end-use or end-user with respect to the subject defense article.

(7) The transfer of a foreign defense article previously imported into the United States that has since been exported from the United States pursuant to a license or other approval under this subchapter, provided:

(i) the foreign defense article was not modified, enhanced, upgraded or otherwise altered or improved in a manner that changed the basic performance of the item prior to its return to the country from which it was imported or a third country; and

(ii) a U.S.-origin defense article was not incorporated into the foreign defense article.

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Bonnie Jenkins,

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Department of State.

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